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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1296

LUPTON MANUFACTURING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ALUMINUM COMPANY OF AMERICA, and CUPPLES PRODUCTS COMPANY, *Appellees*

On Appeal from the United States District Court for the Eastern District of Missouri

OPPOSITION OF LUPTON MANUFACTURING COMPANY TO MOTIONS TO DISMISS

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The separate motions to dismiss filed by the United States and Alcoa-Cupples fail adequately to deal with the significance of the change in Rule 24(a)(2) of the Federal Rules of Civil Procedure.

The motions do not dispel but rather by admissions to be noted herein, confirm the substantial and unique nature of the questions presented by this appeal.

I.

Adequacy of Representation by the Government

In its Jurisdictional Statement Lupton referred to the requirements of the Port Authority that the successful bidder guarantee the work for a period of twenty-five years, and that any subcontractor was made the express agent of the successful bidder who was to be responsible for the successful completion of the project. (Jurisdictional Statement p. 8). The practical significance and the importance of this is underlined by a remarkable assertion:

> . . . customers seeking to place large orders, like the Port Authority, cannot be sure that the current management [of Cupples] will control the company when the orders must be filled. (Page 9, Government's Motion).

Thus there is an admission, in all but direct terms, that as a *sine qua non* for obtaining the Port Authority contract Alcoa and Cupples should be tied together to give assurance to the prospective customer of something comparable to the present control by Alcoa of Cupples. Thus, the Government has condoned, renewed and extended the adverse effect of the joinder of Cupples and Alcoa, which has been adjudged to have prospective anticompetitive effects.

The failure of the Department of Justice to seek to block the unification of Alcoa and Cupples in a long term, multi-million dollar contract and its opposition to Lupton's intervention is especially significant in light of the District Court's previous finding that Alcoa could run Cupples at a loss or break even point and still make a profit on the metal supplied to Cupples.

It would be strained to view as mere chance the fact that neither the Government nor Alcoa-Cupples has

directly met the issue presented by the District Court's order which directed Cupples to exercise independent business judgment in the conduct of its business affairs pending divestiture. (See page 5 of the Jurisdictional Statement). Alcoa simply decided that the contract would be assigned to Cupples when Lupton sought to attack it as a threat to divestiture.[1]

Apparently the movants are unanimous in their views that as long as the contract is determined by them to be "profitable" for Cupples, and that they say so to the District Court, without any supporting verification, the inquiry is at an end. Although Lupton's evidence was that the contract would not promote divestiture, the Court below was not provided with any evidence that the Port Authority Contract would be profitable to Cupples or that tying Cupples to Alcoa would make Cupples more attractive rather than less attractive.

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[1] Roger Lord, Executive Vice President of Cupples admitted at the hearing on January 12, 1967, that the question of whether Cupples would be assigned any contract awarded to Alcoa had not been submitted to him for his agreement or disagreement, and he also stated he knew nothing of any consideration to be paid by Cupples for such assignment. So far as he knew such matters had not been put to the Board of Directors of Cupples. (R. 245-247). See also testimony of Davis, Chief Engineer of Cupples, who had no knowledge of any bid change (R. 242). See also, Appendix A of the opposition, letter from Hickman, an Executive Vice President of Alcoa, to Certain-teed Products, February 6, 1967; "I am sure you know that Alcoa was awarded the curtain wall contract on the World Trade Center and that the contract will be assigned to Cupples. The Department of Justice questioned our right to proceed in this manner but ultimately acquiesced." (Appendix A, page 12). *Cf.* page 5 of Alcoa-Cupples Motion which attempts to gloss over the fact that the Government instituted suit approximately two years before the World Trade Center was even announced.

On page 5 of the Government's Motion it is stated:

> The Department conducted an investigation, required Alcoa to furnish it detailed information, and carefully reviewed the entire transaction. It obtained assurances from Alcoa that the contract would be assigned to Cupples, that Cupples, not Alcoa, would be credited with the goodwill arising from the contract, and that any purchaser of Cupples could seek reformation of any unfilled Alcoa-Cupples contract on the ground that it had been entered into improvidently. The government was also assured by Cupples' president that he considered the contract to be profitable for Cupples. In light of this data, the Department concluded that the transaction did not violate the court's orders, injure Cupples or imperil divestiture. . . . (See also pages 9-10 of Government's Motion).[2]

All that is specified is a set of representations of Alcoa and Cupples, not part of the record. Thus, it is clear from the Government's own description that its action was based only on representations made by Alcoa and Cupples. Nothing like an independent investigation is described so far as this issue is concerned.[3] Accept-

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[2] Regarding this action Alcoa-Cupples states "[t]he Government immediately made inquiries to the Port Authority and the latter stated that it would not negotiate further with Alcoa pending the outcome of the Government's investigation (R. 219). Upon investigation the Government learned that Alcoa and Cupples believed this contract would be valuable business for Cupples and would significantly improve its poor earnings record, thereby enhancing prospects for divestiture (R. 183, 187)." (Alcoa-Cupples' Motion pp. 5-6).

[3] See the "MEMORANDUM OF THE UNITED STATES IN RESPONSE TO MOTIONS OF LUPTON MANUFACTURING COMPANY" filed in the Court below wherein the Court is advised "[i]n particular, the Government has examined the proposed terms of arrangements between Alcoa and Cupples to determine that they are not on their face at least disadvantageous to Cupples." (R. 186-187).

ance of these assurances amounted to resting action on mere conclusions without independant verification that they made business or economic sense and would result in a situation which would promote competitive conditions and not act as an impediment to divestiture.

This Court is informed that "[t]he president of Cupples submitted a detailed written statement indicating that the proposed contract would be very profitable for Cupples . . . ." It is difficult to understand why the Government has never disclosed this statement before. Of course, it is not precisely clear when this statement was submitted. However, at the hearing on January 12, 1967, the president of Cupples admitted that there was no written agreement covering the terms of any subcontracting or assignment of this contract.[4] Similarly, Moran testified there was no written agreement with respect to the price to be paid to Alcoa by Cupples for the metal. (R. 252).

The sufficiency and reliability of any such statement concerning profitability could have been and would have been appraised with the benefit of questioning of Mr. Moran and other Cupples personnel who were called to testify, had Lupton been permitted to intervene, for the existence of such a statement would then have been a discoverable fact.

The allegation that appellant "never questioned Cupple's president, [Moran], concerning the profitability

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[4] Q. "Now with respect to the arrangements between Alcoa and Cupples, Cupples being subcontractor under the bid submitted by Alcoa, are these arrangements incorporated in any written agreement?"

A. "Well there has never been any decision on that. They have had some ideas on it and we have, but it has never been defined." (Moran—R. 251-252).

of the contract, although it was aware of counsel's representation that it would benefit Cupples . . ." (page 12 Government's Motion), mistakes the role of the Government as representative of the public interest. As pointed out on pages 19 and 20 of Lupton's Jurisdictional Statement, the question of profitability of such a contract to Cupples, as well as the details of any assignment which Alcoa, the Justice Department and the Port Authority contemplated were avoided by the Judge during the hearing as apparently unnecessary inquiries. Counsel for Lupton had agreed that such matters, in light of Alcoa-Cupples objections, could be disclosed to the Court and Counsel for the Department of Justice for their benefit alone for purposes of the hearing on Lupton's motion to intervene. (R. 252-253). It should be added that the District Court stated in the early part of the hearing that "Well, the two of you [counsel for Alcoa and the Government] can handle this [commitments made by Alcoa to the Government] any way you want to handle it as far as the Court is concerned. It is up to you." (R. 211).[5] When counsel for Lupton made the above referred to request the Court replied, "Well, if the Court desires or needs it, he will get it." (R. 253). The matter was never introduced thereafter in the record.

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[5] The Government virtually ignores Lupton's argument that in the Department's opposition to Alcoa's petition for a further extension of time in which to accomplish divestiture it admitted "that it was misled into believing that the award of a Port Authority contract to Alcoa-Cupples would promote divestiture of Cupples." (Jurisdictional Statement, p. 17.) The response to this assertion is relegated to a footnote,". . . the contract *might* enhance Cupples saleability, thus serving the ultimate purpose of the decree. We still believe this." (Government's Motion, page 12, footnote 7). (Emphasis added.)

Lupton can hardly be scored for any lack of diligence by the Government, when it was within the undisputed power of Government counsel to require counsel for Alcoa-Cupples to disclose these matters to the Court and did not do so. Lupton was only an applicant for intervention, and could not compel such disclosure. In addition, it was primarily the Government's duty to show that the Port Authority contract would be profitable to Cupples, especially where there existed a history of a steady loss of money coupled with the power of Alcoa to make a profit on the metal it supplied Cupples.

Alcoa, to support its motion, refers to the plan of divestiture ordered by the Court. (Alcoa-Cupples' Motion, p. 4). This provided that such sale was to be to a person "not disapproved by the Court . . . [and] at a price and upon terms to be approved by the Court." (Government's Motion, Appendix B, p. 21). Alcoa, however, offers no explanation why it continually turned down offers to purchase Cupples without calling them to the attention of the Court. Why the Government did not bring to the Court's attention this course of conduct by Alcoa does not appear. It should be noted that neither the Government nor Alcoa refers to that portion of the plan of divestiture which states "[u]pon petition of the plaintiff, the Court may be asked to determine whether any such offer [one not accepted by Alcoa] must be accepted by Alcoa under the provisions of the Final Judgment and this Plan of Divestiture." (Government's Motion, Appendix B, p. 22, para. 7 of the Plan of Divestiture). The fact that Alcoa was able to turn down uninhibited an offer to purchase Cupples on January 11, 1967 on the eve of Lupton's motion to intervene is yet another example of the Government's lack of a diligent policing of this

decree and of adequate representation of the public interest.

Alcoa, unlike the Government, criticizes Lupton's President when he testified that the divestiture of Cupples would be adversely affected by the Port Authority contract. Among other things the contract between Alcoa and Cupples relating to the assignment of the Port Authority Contract, we claimed, would be subject to reformation. Alcoa stated that only certain contracts would be subject to reformation and that the Port Authority contract was not one of them. See also Appendix A of this Opposition, Letter dated February 6, 1967 from Hickman to the president of Certainteed Products Company.)[6] The Government states categorically "... that any purchaser of Cupples could seek reformation of any unfulfilled Alcoa-Cupples contract on the ground it had been entered into improvidently."[7] (See page 5 of Government's Motion.) This is yet another example of an unsolved and unprobed matter before the District Court.

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[6] Counsel for Alcoa, in his statement to the Court on January 12, 1967, declared "[w]e did not agree to the reformation of that [Port Authority] contract, and the Department did not ask us to agree to the reformation of that contract." (R. 220).

[7] The "MEMORANDUM OF THE U.S. IN RESPONSE TO THE MOTIONS OF LUPTON MANUFACTURING COMPANY" submitted to the trial court represented: "[T]he Government has received commitments from Alcoa designed to prevent the contract from standing in the way of divestiture of Cupples; in addition, Alcoa agrees that the purchaser of Cupples would have the right to ask the Court for reformation of contracts between Alcoa and Cupples if these were improvidently entered into." (R. 187).

II.

Lupton's Interest as an Intervenor

In the recent decision of *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.* 386 U.S. 129, this Court vindicated the right of an intervenor under the amended provisions of Rule 24(a) to protect its interest and the public interest in promoting and insuring that there would be a restoration of competitive conditions. It was not the character of Cascade as a customer but its interest in restoration of competitive conditions which is at the core of the decision. Such is Lupton's interest. This is why Lupton has persevered in prosecuting its right to intervene irrespective of the fact that the Port Authority contract has been awarded to Alcoa.

Both the Government and Alcoa-Cupples present the argument that this appeal must be dismissed because of the absence of any mandate of this Court upon which Appellant can rely. Appellant recognizes that the only issue which was appealed to this Court in the case in chief was whether Alcoa should be required to divest itself of the Corona Plant.[8]

However, it seems manifest that any argument concerning the necessity of a mandate of this Court as a prerequisite to support intervention is merely an attempt to sterilize the modification of Rule 24(a) as construed by the Supreme Court by a stylistic literal interpretation of the *Cascade* decision.

Thus, the primary thrust of the *Cascade* decision *supra,* must be viewed as providing that intervention

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[8] Alcoa left the remaining issues unappealed and hence these issues became *res judicata* and the law of the case.

was to be allowed to promote timely and effective divestiture and to guard against any further frustration of divestiture. It is not a fact as Alcoa alleges that "... appellant's private interest in this case is in the establishment of a weak Cupples." (Page 10 of Alcoa-Cupples' Motion). Appellant's interest is rather to insure an independant Cupples, and to guard against a resulting company which would be Alcoa in the guise of Cupples.

CONCLUSION

In view of the foregoing we respectfully urge that the motions to dismiss be denied and that probable jurisdiction be noted in order that the questions presented by this appeal may be resolved.

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APPENDIX A

(Exhibit number one to "DEFENDANTS' OPPOSITION TO GOVERNMENT'S PETITION FOR MODIFICATION OF FINAL JUDGMENT," served on Counsel for the Government May 19, 1967.)

EXHIBIT 1

February 6, 1967

Mr. Malcolm Meyer, President,
Certain-teed Products Corporation,
120 East Lancaster Avenue,
Ardmore, Pennsylvania 19003.

Re: Cupples Products Corporation

Dear Mr. Meyer:

Following-up our telephone conversation of this morning, I enclose the year-end data on the captioned company. You will notice that the company did significantly better in the year just ended, although it still lost money. However, these losses need to be evaluated in the light of non-recurring factors. For example, you will notice that more than $800,000 was lost in June and July. During this sixty-day period, all Cupples' operations were closed by a strike which resulted in a very satisfactory labor contract with the United Steel Workers. The Corona operation was closed as of the year-end so that the $363,000 lost at that site need not be repeated. Some $280,000 was lost at Dowagiac but we believe that this operation can be turned into a profitable one if the Dowagiac facilities are moved to St. Louis, as we are planning. During the first six months of 1966, Cupples carried an interest bearing obligation to Alcoa in the sum of $16,000,000 and during the last six months an obligation of $12,000,000. As a result, operations were charged with a $676,000 interest payment to Alcoa. We capitalized that debt at year-end and, presumably, the interest charge would not be a recurring one if you were to acquire the property.

The extent to which the uncertainties inherent in the sale of a property result in low employee morale is hard to measure, but is certainly there. Likewise, if the present management could put the antitrust litigation and the Corona misadventure behind them and concentrate on business in St. Louis, I am sure they could add immeasurably to the success of the company.

I am sure you know that Alcoa was awarded the curtain wall contract on the World Trade Center and that the contract will be assigned to Cupples. The Department of Justice questioned our right to proceed in that manner but ultimately acquiesced.

In connection with those discussions with the Department, we made another commitment which I am required to bring to your attention. It is to the effect that any Court approved purchaser of Cupples shall have the right to seek Court reformation of the terms and conditions of any unfulfilled contract entered into between Alcoa and Cupples prior to the date of the divestiture, reformation to be on the ground that such contract was improvidently entered into in the light of the facts as they existed at the time such contract was executed. The assignment to Cupples of Alcoa's soon-to-be realized contract with the World Trade Center is an exception to that commitment.

We know of no contract between Alcoa and Cupples to which such reformation could apply. But, for what it is worth, you have the assurance that the Department requires us to give. We would propose to include it in any contract with a purchaser.

Mr. Moran or I will be glad to discuss with you the details of the World Trade Center contract if you become seriously interested in acquiring Cupples. We believe it to be an asset of great value. Along the same line, I enclose a list of Cupples' forward business on contracts over $50,000. Insofar as these contracts involve products other

than those manufactured by Cupples, they are covered by subcontracts.

As we agreed by phone, I shall be glad to meet you at any mutually agreeable time and place after you have digested the data enclosed with this letter.

With cordial regards, I am

Sincerely,

/s/ LEON E. HICKMAN

LEH/jws
Enc.
bc: Mr. C. C. Moran

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

LUPTON MANUFACTURING CO. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

No. 1296. Decided June 12, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed.